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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 943

WILLIAM MARKS, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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October Term, 1966

No.

WILLIAM MARKS, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, William Marks, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case November 9, 1966.

Opinions Below

The *per curiam* opinion of the Court of Appeals, printed as Appendix A hereto, *infra,* is not yet reported. The District Court did not render any opinion as such.

Jurisdiction

The judgment of the Court of Appeals was entered November 9, 1966 (Appendix B hereto, *infra*). The time for filing this petition for certiorari has been extended to and including January 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Petitioner, a member of the Bar and a Certified Public Accountant, was convicted on bribery charges involving Internal Revenue Service auditors, solely on uncorroborated accomplice testimony. The Jury had extraordinary, perhaps unique, difficulty in reaching a verdict on the only issue before them, the credibility of the uncorroborated accomplice witnesses, petitioner having taken the stand in his own defense. The defense expressly urged at the trial that this was a peculiarly appropriate case for an instruction requiring corroboration of the accomplice testimony. The questions are:

1. The sole proof inculpative of petitioner having consisted of uncorroborated accomplice testimony by witnesses of inordinately base credibility who moreover were devastatingly impeached, did not the "better practice" rule of, *e.g., Holmgren* v. *United States,* 217 U.S. 509, 523-524, require that the Trial Court in this particular case grant the express defense request for a jury instruction that credence should not be given to the accomplice witnesses without corroborating testimony? In the circumstances of this case, was it not error to decline to obey the aforesaid "better practice" rule? Has there not come about in the lower Federal Courts an erroneous doctrine that corroboration of accomplice testimony is *never* required, based upon an oversimplified reading of this Court's carefully phrased language in *Caminetti* v. *United States,* 242 U.S. 470, 495-496, where the Court noted the *Holmgren* "better practice" rule, noted also its approval of that rule by stating that " * * * this is so, * * * ", and then

added merely that " * * * there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them"?

2. Petitioner's conviction having been on four counts, and the Jury having acquitted him on six other counts (after lengthy and difficult deliberations), do not the circumstances of the case call still more compellingly for applying an accomplice-corroboration requirement inasmuch as the case also indicatively is one of a "compromise verdict" of the sort which the law forbids? And does not this "compromise" verdict feature in itself merit the granting of certiorari in the interest of maintaining the basic fairness of Federal criminal justice?

3. In the circumstances shown by the two preceeding questions—an indicatedly "compromise" conviction on uncorrobated accomplice testimony—did there not result a further denial of fair trial by the Trial Court's rulings which prevented the defense from cross examining the accomplice witnesses as to other bribe-taking activities in which they had engaged?

Constitutional Provisions and Statutes Involved

The case involves the Fifth Amendment (due process of law) and the Sixth Amendment (impartial jury) of the United States Constitution. The indictment charges were based on 18 U.S.C. §201, 1958 ed. (bribery), 26 U.S.C. §7214(a)(2) (receiving unlawful fees), and 18 U.S.C. §2 (aiding and abetting). No certiorari issue is presented here in regard to the latter statutes, therefore we do not print them.

Statement of the Case*

1. Introductory

This petition seeks review of a judgment of the United States Court of Appeals for the Second Circuit (Appendices A and B *infra*) which affirmed a final judgment (290a) of the United States District Court for the Southern District of New York (MacMahon, D.J.), entered March 22, 1966, after a jury trial, convicting petitioner on two counts of bribing two respective Internal Revenue Service auditors (18 U.S.C. §201, 1958 ed.) and two counts of aiding and abetting the same two respective officers in receiving unlawful fees (26 U.S.C. §7214(a)(2), 18 U.S.C. §2). Petitioner, a member of the Bar and a Certified Public Accountant, was sentenced to one year and one day on each count concurrently, execution of the sentence of imprisonment was suspended, and petitioner was placed on probation for a period of one year, subject to the standing probation order of the Court and with the special conditions of

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* References appearing *infra* as " a" are to the printed "Appellant's Appendix" in the Court of Appeals, nine extra copies of which are filed herewith. To facilitate convenient appellate evaluation, from the factual standpoint, of our contentions concerning the accomplice-non-corroboration rule in this case, we undertook to print in our appendix in the Court below the entirety of all of the trial testimony and all of the other trial minutes which may have a fair bearing upon the issues of guilt or innocence in the posture of the case in which it went to the Jury. We aimed at including in our printed appendix all testimony on direct examination by both sides (the only omissions being items of colloquy or the like which do not affect any interest of either side), all cross examination by the Government of defense witnesses (again subject only to the unimportant category of omissions just mentioned), those portions of the defense cross examination of Government witnesses which appear to us to affect more or less significantly the Government's direct examination of those witnesses, the entire summations by both sides, and several portions of colloquy which affect the issues of law on review.

probation that petitioner resign as a member of the Bar, resign as a Certified Public Accountant and surrender his Treasury card (291a). These special conditions are stayed pending review.

The Jury acquitted the defendant on six other counts in the same indictment (2a, 283a—details *infra*).

2. The Petitioner

Petitioner is thirty-five years old, married, father of two young children, and he has never before been in trouble with the law. He took the stand in his own defense at this trial and maintained his innocence against his accusers, all of whom were former Internal Revenue Service employees who had admitted that they had engaged in numerous other briberies not involving petitioner. As described *infra*, the Jury evidently experienced extraordinary difficulty in finally arriving at a verdict in this case, and indicatively the Jury's difficulty was caused by the basely poor credibility of the accusing witnesses, so that the case becomes (we respectfully contend) an appropriate one for appellate consideration of whether the prevailing Federal rule of non-corroboration of accomplice testimony has had a fair and just impact in this case.

3. The Indictment;* the Government's Theory of the Case

The indictment (4a *et seq.*) was in ten counts which may be broken down as follows: (1) Of the four conviction counts (Counts One, Two, Three, Four) Count One in-

* Since we assume that our accomplice-corroboration issue (as well as our "compromise verdict" issue) has a realistic chance of favorable consideration only in relation to the detailed factual merits of the case, we are describing the indictment charges in some detail. And in Appendix C hereto, *infra*, we set forth the detailed description of the trial proofs which we submitted in the Court below.

volved a charge of bribing ($100) an Internal Revenue Service audit officer named Wolf on October 30, 1962 in connection with the income tax return of a client of defendant named Armstrong for the year 1961; Count Two charged bribery ($200) of an audit officer named McCallion on December 11, 1962 in connection with tax returns of three clients of the defendant named Barker, Borkin and Leib for the year 1961; Count Three involved the same facts as Count One, in regard to audit officer Wolf, the charge here being that the defendant aided and abetted Wolf in receiving an unlawful fee (the same $100 involved in Count One); Count Four was in essence a repetition of Count Two, involving audit officer McCallion, on the theory of aiding and abetting the latter to receive an unlawful fee (the same $200 involved in Count Two). (2) As to the six counts on which the Jury acquitted the defendant, Counts Five and Eight, respectively, involved bribery and gratuity charges ($75) involving the same above named audit officer Wolf on May 23, 1963, in regard to a client of the defendant named Caine for the year 1961; Counts Six and Nine were similar, respectively, to Counts Five and Eight, charging bribery and gratuity offenses ($50) in regard to an audit officer named Deitsch on September 26, 1963, with respect to a client of the defendant named Cantor for the year 1962; Counts Seven and Ten, were likewise similar (bribery and gratuity—$100) involving an audit officer named Clyne on January 20, 1964, with respect to a client of the defendant named Doft for the year 1962.

The four above named Internal Revenue Service audit officers—Wolf, McCallion, Deitsch and Clyne—testified in this trial (details in Appendix C hereto, *infra*). Each of

them accused petitioner of having come to the Internal Revenue Service offices to conduct an audit of a client's tax return, of having requested the respective audit officers to make a favorable audit with a promise or hint of payment therefor, of having also requested the respective audit officers in certain instances to assign themselves to an audit which such officer might otherwise not have been officially assigned to handle, and of having met them later at petitioner's office or at another place when the above mentioned bribes or gratuities were paid in cash by petitioner to the audit officers.

4. The Theory of the Defense

The defense contended that the four above named accusing witnesses had given false testimony against petitioner, and that they had done this in the effort or hope of purchasing favor for themselves after they had each been caught by the Inspection Service of Internal Revenue as members of an apparently widespread ring of corrupt Internal Revenue audit officers. Petitioner on the stand at this trial (Appendix C hereto, *infra*) swore that all of the audits involved in this indictment had been handled on a perfectly routine and proper basis, that he had submitted substantiation of the taxpayers' positions to the audit officers, and that no improper payments, bribes, etc. had been made or requested by any of the audit officers, except that in the case of one of them (Clyne) there had been a possible hint that he was expecting such payment.

5. The Unusually Prolonged and Evidently Conflicted Deliberations of the Jury

The trial began on Monday, March 14, 1966 (2a). It continued on that day and for the next two days, it was ad-

journed during Thursday, March 17, it resumed on Friday, March 18, and on Monday morning, March 21, the Court charged the Jury (2a). Thus, this was a relatively short trial; and, as above seen, the factual issues were rather simply and sharply drawn. Nevertheless the Jury experienced extraordinary difficulty in deciding the case. The Jury retired to commence its deliberations at 11:32 A.M., Monday, March 21, 1966 (263a). At 3:09 P.M., after the Jury had requested certain exhibits and testimony, the Court received a note from the Jury reading, "The Jury has instructed me to inform the Court that it is hopelessly split 6-6 on every count. We await your instructions" (265a-266a). The Court gave the Jury a brief instruction urging them to continue their deliberations and try to reach a verdict (*ibid*). After additional requests for the reading of certain testimony, and after the Jury had gone to dinner at 6:00 P.M., the Jury sent the Court another note at 8:38 P.M. reading, "The Jury is completely deadlocked on all counts with no progress since dinner" (268; see also 266a-268a). The defense informed the Court—after counsel had consulted with the defendant and the latter's wife—that the defense was emphatically and strongly desirous of having the Jury continue its deliberations so that a verdict could be reached (269a-270a). At 8:50 P.M. the Court, after another general instruction urging them to try to reach a verdict, excused the Jury until the following morning (270a-271a). The next morning, at 10:32 A.M., the Court again instructed the Jury, this time more fully, as to their duty to try further to reach a verdict (274a-276a). The Jury resumed its deliberations at 10:40 A.M., and ten minutes later they requested the Court to repeat to them the charge to the Jury (276a), which was done, the reporter

reading to the Jury the Court's entire charge (278a). At 3:25 P.M. that afternoon another note was received from the Jury stating, "the Jury finds it impossible to come to a unanimous verdict on any of the ten counts" (279a). The *defense* then suggested to the Court that the jurors be asked whether any of them thought there was any chance of arriving at a verdict if they continued to deliberate, and that if any juror responded to the question affirmatively, the Jury should be instructed to continue its deliberations; the Court adopted this suggestion of the defense (279a-282a); a number of jurors raised their hands in the affirmative (282a). The Jury resumed its deliberation at 3:40 P.M., and at 5:10 P.M. they reported their verdict (282a-283a).

We have set forth the above detailed description of the Jury's deliberations because, we are frank to state, we deem it to be in the just interests of petitioner that central emphasis in this case should be placed upon this fact that the Jury had so much difficulty in bringing in a verdict of conviction as to four of the ten counts. As previously mentioned, we think that this reflects the Jury's poor opinion of the four ex-Internal Revenue witnesses (Wolf, McCallion, Deitsch and Clyne), all of whom (under the Government's theory of the case) were accomplice witnesses whose testimony was not corroborated in any degree or manner; and that this in turn gives rise to important certiorari issues in this case relating to the accomplice-non-corroboration rule and to certain trial errors (as we respectfully consider them to be) which may well have been decisive in turning the scales against petitioner—*a fortiori* so in view of the Trial Court's refusal to meet the defense objection that this was preeminently a suitable case in which to instruct the Jury that they should not believe the accomplice witnesses without corroboration.

6. The Opinion Of The Court of Appeals

The *per curiam* opinion of the Court of Appeals (Appendix A hereto, *infra*) rejected our accomplice-corroboration argument by citing previous Second Circuit decisions which had rejected identical contentions, and by referring to the fact that the Trial Judge had instructed the jury that the Government's witnesses were accomplices and that their testimony must be scrutinized with special care and be acted upon with caution. The Court of Appeals did not mention our "compromise verdict" contention. It rejected our contention that we had been unfairly prevented from cross-examining accomplice witnesses as to other occasions on which they had accepted bribes, the Court stating that the defense had been permitted to bring out bribe-taking convictions of the Government's witnesses, that they had not yet been sentenced and that they were testifying in the hope of avoiding jail sentences; the Court adding that it was well within the Trial Judge's discretion to limit further cross examination on the issue of credibility.

REASONS FOR GRANTING THE WRIT

I.

Accomplice-corroboration and compromise verdict: Petitioner was denied a fair trial because he was convicted upon the uncorroborated testimony of accomplice witnesses. The commonly-accepted Federal rule dispensing with the requirement of such corroboration proves, upon a historical analysis of the cases, to be not a rule of invariable application, but indeed it is authoritatively held to be the "better practice" to require corroboration, and in any event the circumstances of the present case call for the use of such "better practice" here.

The petitioner Marks has been convicted upon the uncorroborated testimony of accomplice witnesses. It is familiar that in jurisdictions or in cases where the accomplice-corroboration requirement is applied, accomplices cannot corroborate each other. E.g., *People* v. *O'Farrell,* 175 N.Y. 323, 67 N.E. 588 (1903).

One further prefatory word: We are not urging this Court to depart in a precedent-shattering way from what we of course concede is commonly regarded as being the established Federal rule that corroboration of accomplice testimony is unnecessary. What we are asking the Court to do is to rule, on the basis of the historical case-law analysis *infra,* that in our particular case justice, fairness and sound judicial discretion required an instruction to the Jury that *none* of the accomplice testimony should be believed unless it was supported by corroboration.

The contention which we are here urging was duly preserved in the Trial Court. See 262a-263a, 285a. The Trial

Court's instructions to the jury that corroboration is not required appear at 248a.

Historical Review of the Federal Rule as to Corroboration of Accomplice Testimony.

Except for *Holmgren* v. *United States,* 217 U.S. 509, which we discuss *infra,* the only explicit declaration which has ever been made by this Court on the question of whether corroboration of accomplice testimony is *required* in Federal criminal trials, is merely the statement that no absolute requirement of such corroboration exists. *Caminetti* v. *United States,* 242 U.S. 470, 495-496.

The *Caminetti* case was decided on *January 15,* 1917. At the same Term, on *June 11,* 1917, the Court decided *Valdez* v. *United States,* 244 U.S. 432, affirming a conviction for murder committed in the then Territory of the Phillipine Islands. So far as appears from the report of the decision in *Valdez,* and from the description of the arguments and briefs of counsel in the Lawyers Edition Report (61 L. Ed. pp. 1242 et seq.), the case did not involve any statutory or constitutional provision applicable to the Phillipines Territory which would have required corroboration of accomplice testimony. It is therefore of considerable interest that the Court in *Valdez* expressly undertook to examine whether there had been corroboration of the accomplice testimony in that case (244 U.S. at 440-442). Both the majority and minority opinions in *Valdez* make it rather plain that the probable reason why the Court felt called upon to look into the question of corroboration was that the accusing accomplice was a person of conspicuously corrupt character.

This circumstance in the *Valdez* case which seemingly led the Court to attach importance to the question of corroboration of accomplice testimony within barely six months after the Court's qualified negation of the requirement of such corroboration in the *Caminetti* case, persuasively suggests that the Court never intended, by the *Caminetti* decision, to rule out the necessity for considering the sufficiency of corroborating evidence on an unvarying and unqualified basis in Federal criminal proceedings, but that at least in cases where the character of the accomplice is conspicuously untrustworthy, considerations of justice would favor that a Federal court should undertake such inquiry into the sufficiency of the corroboration. All of which stands *a fortiori* in the instant case, where there is no "corroboration" at all.

For a comprehensive collection of the older American authorities—preceding the *Caminetti* case—which required corroboration of accomplice testimony, see the Reporter's notes of the argument of counsel in 61 L. Ed. at pp. 444-445.

There is additional persuasive indication that the *Caminetti* language—that corroboration of accomplice testimony is not an absolute requirement in Federal criminal trials—was not intended to mean that the failure to require such corroboration would never be error. Indeed, the pre-*Caminetti* decision now to be mentioned (which as we shall show stands undisturbed by any other decision of this Court to this day) flatly rules that requirement of corroboration is "better practice." In *Holmgren* v. *United States,* 217 U.S. 509, decided in 1910 by a unanimous Court and never thereafter criticized, disparaged or departed from in any other decision of the Court (including *Caminetti*), the Court said

that "*It is undoubtedly the better practice* for courts to caution juries against too much reliance upon the testimony of accomplices, *and to require corroborating testimony before giving credence to them*" (pp. 523-524) (emphasis supplied).

In *Caminetti* the Court referred to *Holmgren*, stating that in the latter case "* * * this Court refused to reverse a judgment for failure to give an instruction of this general character [i.e., that accomplice testimony must be corroborated] while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence" (242 U.S. at 495). The Court immediately then went on to say, in *Caminetti*, that "while this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them" (*ibid.*).

Thus the Court in *Caminetti* appears to have fully preserved in force the "better practice" standards laid down in *Holmgren*.

Also, nearly three years after *Holmgren* the Court in *Bennett* v. *United States*, 227 U.S. 333, 339 (decided February 4, 1913), although not referring to *Holmgren*, had treated an issue of corroboration of accomplice testimony on the basis of apparent assumption that such corroboration might properly be required.

And, as seen, in June 1917, six months after *Caminetti*, the Court in *Valdez* (*supra*), evidently took it for granted that non-corroboration may be determinative.

The earliest decision in the lower Federal courts which noticed the *Holmgren* ruling was *Richardson* v. *United States,* 181 Fed. 1, 9 (C.C.A. 3 1910), where the *Holmgren* case was cited only for the following proposition:

> "No doubt there is a well established practice, sanctioned by long practice and judicial approbation to caution juries about accepting the evidence of an accomplice without material corroboration, coming as it does, from a polluted source. But this is as far as the matter goes."

Thus, within a few months after this Court's decision in *Holmgren,* and several years before *Caminetti,* there had commenced *in the lower Federal courts* that emasculative interpretation of the *Holmgren* language which was eventually to become virtual gospel in Federal criminal trials, namely, that there is *never* any need for a court to insist upon corroboration of accomplice testimony and that the most that is needed is a cautionary instruction to the jury.

Almost *sub silentio,* then, as it were, the "better practice" which in *Holmgren* was stated to include both the general cautionary instruction and the requirement of corroboration, has reductively involved into a "better practice" requirement only as to the cautionary instruction. For example, *Lyles* v. *United States,* 249 F. 2d 744, 745 (C.A. 5 1957), treats the *Holmgren* rule as "dictum"! Even more reductive—indeed obliterative—is *Doherty* v. *United States,* 230 F. 2d 605 (C.A. 9 1956), holding, on the basis of *Caminetti* and even of *Holmgren* itself that "corroboration is not essential". Again, in *Cowell* v. *United States,* 259 F. 2d 660, 661 (C.A. 9 1958), the Court took it upon itself—unwarrantedly—to observe that in the *Caminetti* case this Court treated the rule of the *Holmgren* case as "mere dicta."

On the other hand, it is instructive to examine what one may term the *"pro-Holmgren"* cases of the early part of the century: In the second of the cases in the lower Federal courts wherein the *Holmgren* rule was noted—the first having been the disparaging *Richardson* case, *supra*—a case arising in 1913 in the Eighth Circuit (opinion by Sanborn, C.J.), the matter went quite differently from the way it had gone in the *Richardson* case in the Third Circuit in 1910, *supra*. We refer to *Sykes* v. *United States,* 204 Fed. 909, 913 (C.C.A. 8 1913), where the Court said:

> "It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime. 'It is undoubtedly the better practice,' says the Supreme Court, 'for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them.' Holmgren v. United States, 217 U.S. 509, 523, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778.)
>
> And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. Jahnke v. State, 69 Neb. 154, 104 N.W. 154, 158."

Moreover, in a ruling reminiscent of the "plain error" rulings of contemporary Federal criminal practice, the Court in *Sykes* rejected a contention by the Government that the point as to non-corroboration of the accomplice tes-

timony had not been preserved by the defense through an express request for a peremptory instruction after the close of the evidence, the Court saying (204 Fed. at 913-914):

> "* * * But there is an exception to this general rule which has been made to prevent just such gross injustice as would result from the punishment of the defendant Sykes upon the evidence which has been recited. It is that in criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice such a grave error as his conviction without evidence to support it, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error." (Citing authorities)

The Court concluded its opinion in the *Sykes* case with still a further ringing expression of its indignation at being asked to affirm a criminal conviction based on the uncorroborated testimony of an impeached accomplice witness (204 Fed. at 914):

> "The defendant in this case may not be lawfully deprived of his liberty for five years without proof of his guilt beyond a reasonable doubt much less without any substantial evidence of it, and this court cannot disregard his appeal, sit in silence, and permit the perpetration of such an injustice."

The *Sykes* case was followed in *Fain* v. *United States,* 209 Fed. 525, 533 (C.C.A. 8 1913).

The next case in which the *Holmgren* rule was noticed, *Diggs* v. *United States,* 220 Fed. 545 (C.C.A. 9 1915), resumes the disparaging approach. This is the case which

later was decided by this Court under the name of the *Caminetti* case, *supra*. In *Diggs*, the Ninth Circuit said "Notwithstanding the views expressed by the Supreme Court in the *Holmgren* case as to the better practice, that Court and the Federal courts generally have held that corroborating testimony is not necessary to support a conviction" (220 Fed. at 552). *No decision of this Court was cited to support this last quoted statement.*

The next decision in which the *Holmgren* rule was noticed was *Mark Yick Hee* v. *United States*, 223 Fed. 732 (C.C.A. 2 1915), where the Court apparently construed *Holmgren* as meaning only that "there is no common law rule which forbids a conviction upon the uncorroborated testimony of an accomplice whose evidence satisfies the jury beyond a reasonable doubt of the guilt of the accused" (p. 735).

In February 1917, about two weeks after this Court's decision in *Caminetti*, the Third Circuit again followed its ruling in the *Richardson* case, *supra*, which as we view it, gave an emasculative meaning to the *Holmgren* rule. *Knoll* v. *United States*, 239 Fed. 16, 20-21 (C.C.A. 3 1917).

Of special interest as indicating how a conscientious Federal trial judge in the era immediately following the *Caminetti* decision was understanding this Court's declaration in the latter case, see *United States* v. *Murphy*, 253 Fed. 404, 406 (N.D.N.Y. 1918), where the Court, treating the *Holmgren* rule as being still controlling, and evidently referring to the *Caminetti* case and similar decisions of the lower Federal courts, said that those cases do "not hold, as contended for by counsel, that corroboration of an accomplice is not necessary, but they do hold that a conviction may be had without corroboration. A

distinct difference. The principles enunciated in these decisions unquestionably apply to the testimony of an accomplice who has testified in a case and leaves the witness stand unimpeached. The Supreme Court, in such instances, as declared in the *Holmgren* case, *supra,* holds that a trial court should caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence * * *." The Court then went on, in the *Murphy* case, *supra,* to point out how much more serious the problem is when the accomplice witness "leaves the stand a thoroughly discredited witness upon many material points * * *" (p. 407).

Again, in 1919, two years after the *Caminetti* decision, the *Holmgren* rule was fully applied so as to bring about a reversal of a conviction in the Second Circuit, *McGinniss* v. *United States,* 256 Fed. 621, 626 (C.C.A. 2 1919). The Court said (p. 626):

> "* * * It is only when the evidence is sufficiently convincing of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime, and in a case such as this, the better practice was not to place reliance upon the testimony of this accomplice and to require corroborating testimony before giving credence to him. Holmgren v. U.S., 217 U.S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778. We feel required to say that the uncorroborated testimony of this perpetrator of a crime confessed under oath, and not supported by other witnesses, with a possible hope of immunity from punishment, is not only insufficient to establish the guilt of the plaintiff in error beyond a reasonable doubt, but that it presents no substantial evidence of it."

See also *Freed* v. *United States,* 266 Fed. 1012, 1014-1016 (D.C. App. 1920), where the Court referred to the fact that "for more than forty years in this jurisdiction it has been the practice to safeguard the interests of accused in prosecutions for serious offenses, where the testimony of accomplices has been admitted, by bringing directly to the attention of the jury the nature of such evidence, and the danger of convicting unless they should find supporting or corroborating evidence." The Court then went on to explain its view of the net combined effect of the *Holmgren* and *Caminetti* cases saying, "Certain it is that the Supreme Court has not ruled that the refusal of a trial court to grant a proper instruction, in a case where there is little, if any, evidence other than that of accomplices, is not so prejudicial to the accused as to warrant an appellate court in awarding him a new trial" (p. 1016).

In *Wagman* v. *United States,* 269 Fed. 586, 572 (C.C.A. 6 1920), the Court reiterated the *Holmgren* rule that "It would have been better practice to caution the jury against relying too greatly upon the testimony of these accomplices and to require corroborating testimony before giving it credence, * * *."

In *Morenkow* v. *United States,* 276 Fed. 293, 294 (C.C.A. 6 1921), the Court noted the *Holmgren* rule and that in the subject case the jury had been advised that it was "unsafe to convict a man under trial upon the uncorroborated testimony of an accomplice," the Court noting also that there had been such corroboration in the *Morenkow* case.

To the same effect, see *Rudner* v. *United States,* 281 Fed. 516, 521 (C.C.A. 6 1922).

It is true that a little less than two years after the decision in *McGinniss, supra,* the same bench in the Second Circuit which had decided that case ruled in *Rosen* v. *United States,* 271 Fed. 651, 656 (C.C.A. 2 1920) that corroboration of accomplice testimony was not absolutely essential to conviction, but in approving a jury instruction in the *Rosen* case which included the statement that "if, in your judgment, there are no surrounding circumstances tending to corroborate them, you will be justified in rejecting their testimony," the Court referred to the *Holmgren* rule.

It is true also that by the early part of the year 1923 the Second Circuit (again the same bench as in *McGinniss, supra*) seems to have gone over all the way to the narrower interpretation of the *Caminetti* case, viz, that, unqualifiedly, corroboration of accomplice testimony is not required. *Rachmil* v. *United States,* 288 Fed. 782, 785 (C.C.A. 2 1923).

By the mid-1920's, the unqualified reading of the *Caminetti* language that corroboration is not absolutely required appears to have become the set pattern among the Federal circuits, and the *Holmgren* rule receded from attention. E.g., *Betz* v. *United States,* 2 F. 2d 552, 554 (C.C.A. 6, 1924); *White* v. *United States,* 4 F. 2d 758, 759 (C.C.A. 9, 1925).

However, the Eighth Circuit continued its seeming preference for the *Holmgren* rule. *Rossi* v. *United States,* 9 F. 2d 362, 366 (C.C.A. 8, 1925); *Lett* v. *United States,* 15 F. 2d 686, 689 (C.C.A. 8 1926). Still, soon after this, in another case, the Eighth Circuit appears also to have switched over to the unqualified version of the *Caminetti* rule. *Wishart* v. *United States,* 29 F. 2d 103, 105 (C.C.A. 8 1928).

Yet, around the same time, in *Arnold* v. *United States*, 94 F. 2d 499 (C.C.A. 10 1928), the Tenth Circuit appears to have invoked the test of sufficiency of corroboration of accomplice testimony on the ground that the trial court had not given the jury an adequate instruction along general cautionary lines as to the weight to be given to accomplice testimony. See 94 F. 2d at 501, 506-509. This step by the Tenth Circuit in the *Arnold* case is extremely interesting, we submit, as indicating once again, during the focal period of the late 1920's, the continuing vitality of the *Holmgren* rule as a matter of justice and fairness at least on a case by case basis.

The *Arnold* case was cited with approval, and the seeming principle laid down in the *Arnold* case as above described was apparently approved, little more than a decade ago in the Tenth Circuit case of *Johns* v. *United States*, 227 F. 2d 374, 375 (C.A. 10, 1955).

Also, citing the *Arnold* case with seeming approval of the point hereinabove described is *People* v. *Dail*, 140 P. 2d 828, 834 (S. Ct. Cal. 1943), where the Court quotes a passage from "American Jurisprudence" which is to the same effect as the *Arnold* point.

See also to like effect the dissenting opinion of Circuit Judge Frank in *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 646, fn. 9a (C.C.A. 2 1946).

We are aware that the Second Circuit has expressly rejected the *Arnold* point. *United States* v. *Gallo*, 123 F. 2d 229, 230-231 (C.C.A. 2 1941). But this very conflict of Circuits shows the continuing ferment surrounding this question in the administration of Federal criminal justice.

That the *Holmgren* rule is by no means dead in the relatively recent doctrinal thinking of Federal Judges is further shown by *Smith* v. *United States,* 224 F. 2d 58, 60 (C.A. 5 1955), where the Court referred to " * * * the principle that the testimony of a co-conspirator must be received with caution and should be corroborated, as here, by other evidence," citing *Caminetti* and *Holmgren.* Cf. also *Gormley* v. *United States,* 167 F. 2d 454, 457 (C.C.A. 4 1948), quoting with approval the earlier Fourth Circuit case of *Hobach* v. *United States,* 296 Fed. 5, 8 to the effect that "there is no hard and fast rule requiring the corroboration of an accomplice" in the Federal courts. This language denotes, once again, that there is at least a certain residual doctrinal vitality in the *Holmgren* rule among the lower Federal Courts.

Also, notwithstanding the supposed universality of the more recent rule dispensing with the requirement of corroboration of accomplice testimony, there are additional cases indicating that some of the Circuits do occasionally reason in terms of a seeming acceptance of the right of a defendant to insist upon such corroboration. E.g., *Gordon* v. *United States,* 164 F. 2d 855, 859 (C.C.A. 6 1947), cert. denied 333 U.S. 862; *Stewart* v. *United States,* 131 F. 2d 624 (C.C.A. 5 1942), cert. denied 318 U.S. 779; *Stanley* v. *United States,* 245 F. 2d 427, 433 (C.A. 6 1957).

We note also, incidentally that in *Barnett* v. *Government of Canal Zone,* 25 F. 2d 459 (C.C.A. 5 1928), the Court applied the Canal Zone statute that a conviction cannot be had on the uncorroborated testimony of an accomplice. Cf. also *Ing* v. *United States,* 278 F. 2d 364, 366 (C.A. 9, 1960), and *Christy* v. *United States,* 261 F. 2d 357, 359

(C.A. 9 1958), cert. denied 360 U.S. 919, applying the Alaska Territorial statute requiring corroboration and setting the standards therefor.

Other recent decisions in the Federal Circuits reveal, variously, a certain disquiet concerning the possible injustices which may obviously arise from the non-corroboration rule. Thus, in *Williamson* v. *United States*, 332 F. 2d 123, 132-133 (C.A. 5 1964) the Court noted "the obvious weaknesses" in the accomplice testimony and stated that in view of the Federal rule permitting conviction on uncorroborated accomplice testimony, such testimony "is worthy of special attention by the Trial Judge as he translates the case into understandable terms for jury resolution."

Cf. also the cases where, while voicing adherence to the non-corroboration rule, the Courts (including the Second Circuit) have nevertheless been at pains to assure themselves that corroboration was present and that it was ample corroboration to justify the fairness of a verdict of guilty. E.g., *Williams* v. *United States*, 328 F. 2d 256, 259-260 (C.A. 8 1964); *United States* v. *Torricone*, 242 F. 2d 555, 557 (C.A. 2 1957).

Recently also the Eighth Circuit expressed disquiet, in two decisions, about criminal convictions obtained on uncorroborated accomplice testimony. *Osborn* v. *United States*, 351 F. 2d 111 (C.A. 8, 1965); *Masters* v. *United States*, 351 F. 2d 105 (C.A. 8, 1965). Cf. *United States* v. *Johnson*, 343 F. 2d 5, 7 (C.A. 2, 1965).

* * * * *

We respectfully urge also that the circumstances of our case—the poor credibility of all of the accomplice wit-

nesses,* and the peculiar pattern of the jury verdict reached only after such unusual difficulty—are strongly indicative of a "compromise verdict" of the sort which the law forbids. *Hyde* v. *United States,* 225 U.S. 347; 53 Am. Jur. 714 (*Trial,* §1033). See also *Manley* v. *United States,* 283 F. 2d 211, 222 (C.A. 6, 1956), where the Court, while conceding that inconsistent verdicts standing alone would not justify reversal, went on to say:

> "* * * but, when an obviously inconsistent verdict as to different Counts * * * is returned by the jury, both the Trial Court and the reviewing court should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

We do not think that any extended argument is needed to demonstrate that the pattern of the Jury verdict as to the several counts raises very disturbing questions as to the rationality and the justice of the conviction of petitioner Marks. We know that the Federal decisions speak a virtual refrain of the theme that verdicts under multiple count indictments need not be consistent; and that some of the cases even say such verdicts need not be rationally consistent, or that a verdict of conviction under a particular count need not be rational in relation to the verdicts on other counts.

However, the rigid Federal rule above mentioned has from time to time produced judicial expressions denoting less than an entire satisfaction with the rule; and we think that appellate dissatisfaction with the rule would be very strongly justified indeed on the facts of our case. See, for example, *United States* v. *Maybury,* 274 F. 2d 899 (C. A. 2 1960), declining to apply the rule in a non-jury case. See

* See Appendix C hereto, *infra.*

also *Parr* v. *United States,* 363 U. S. 370, 393-394, where this Court disapproved a conspiracy conviction on the ground that, on the facts presented, a substantive count whose violation was the subject matter of the conspiracy count could not be sustained. There have been expressions in other cases denoting a less than absolute commitment to the rule. E.g., *United States* v. *Albers,* 115 F. 2d 833 (C. C. A. 2 1941), declaring that the verdict was "not *so inconsistent* as to require that it be set aside"; *Apodaca* v. *United States,* 188 F. 2d 932 (C. A. 10 1951), remarking that consistency in a verdict is not "an *invariable* exaction of the law"; *United States* v. *Moloney,* 200 F. 2d 344 (C. A. 7 1953), stating that "*generally*" the verdict need not be consistent; *Heflin* v. *United States,* 132 F. 2d 907 (C. C. A. 5 1943) holding that the verdict did not give rise to "*fatal* inconsistency". And see especially *United States* v. *Wilson,* 342 F. 2d 43 (C. A. 2 1965) (a non-jury case) stating that the verdict "was not *wholly irreconcilable* with *any* rational theory". (Emphasis supplied.)

It is hard to avoid the conclusion that if the jury in the instant case had been allowed to apply the "better practice" corroboration requirement, the jurors who so long stood for acquittal would have carried the day for the defendant in the jury room; or, at the least, would not have joined in any vote for conviction.

II.

Petitioner was denied a fair trial by the Trial Court's rulings which prevented the defense from cross-examining the accomplice witnesses as to the other bribery activities in which they had engaged.

In this prosecution where the single dispositive issue of fact for jury determination was whether to believe the defendant or the accomplice witnesses, it was essential as a matter of fair trial that all proper scope be allowed to the defense for impeachment of the credibility of the accomplice witnesses. Cf. *United States* v. *Cardillo,* 316 F. 2d 606, 610-611 (C.A. 2 1963). The heart of the defense theory in this case was that the four former Internal Revenue auditors who testified against petitioner were of a character so unscrupulous and so base that, when faced with discovery of their own misdeeds (which had evidently been of habitual if not epidemic proportions), they would unhesitatingly try to save themselves by offering up other victims to a possibly over-zealous prosecutive organization, and that it would not matter to such villaineous creatures as the accomplice witnesses in this case whether the propitiatorily chosen victims were guilty or innocent persons. That the Jury, or a substantial number of the jurors, considered these defense suggestions to be entitled to realistic consideration under the rule of reasonable doubt, is vividly demonstrated by the record herein.

It cannot be said, then, that this is a case in which, at some measurable or even approximate stage in the cumulation of credibility-impeaching facts elicited by the defense in the cross examination of the accomplice witnesses, restrictive rulings by the Trial Court to prevent further im-

peachment may be deemed harmless or a proper exercise of discretion. Perhaps in this last sentence of ours we have stated the matter too sweepingly; perhaps even in a case like this one some such properly measureable stage could be reached at which the Trial Court's restrictive rulings would deserve to be upheld on appeal or certiorari. But this latter hypothetical stage was not reached in this case, we submit, at those junctures of the trial when the restrictive rulings were imposed—and were thereafter maintained for the duration of the trial.

Thus, at 36a, during the defense cross examination of the prime accomplice witness Saul Wolf, the Court sustained the prosecutor's objections to each of several defense questions aimed at eliciting the facts of Mr. Wolf's prior career of habitual bribe-taking as an Internal Revenue Service auditor. At 37a-39a, in a side bar discussion, the defense unavailingly pleaded with the Trial Judge to allow this vital avenue to be explored; the Judge, deeming that such must be prevented on the basis of three decisions of the Second Circuit to which we shall allude *infra*.

Again, at 118a-126a, in a side-bar conference following the direct examination of the execrable accomplice witness Jeremiah Clyne, the defense requested permission to go into the subject of Clyne's prior bribery career, and the Court refused. This inquiry which the defense wanted to make concerning Clyne could have been especially fruitful because there was a transcript of a minifon recording in which Clyne had inculpated himself as an inveterate bribe-taker of inordinate greediness (118a-126a).

As indicated, the Trial Judge closed off the defense from pursuing these avenues of cross examination on the basis

of three decisions of the Second Circuit, namely, *United States* v. *Provoo,* 215 F. 2d 531 (C.A. 2 1954); *United States* v. *Owens,* 263 F. 2d 720 (C.A. 2 1959); and *United States* v. *Irwin,* 354 F. 2d 192 (C.A. 2 1965). See 36a-39a.

We submit that the latter three decisions—of which the *Irwin* case may be taken as embodying the most systematic statement of the rule as to the Trial Court's discretion in this area—have no proper application to the present situation. *Provoo* dealt with a defendant's right to be protected against improperly impeaching cross examination concerning "collateral" matters, and it expressly drew a distinction as to non-defendant witnesses. *Owens* and *Irwin* lay down nothing more than general tests for reviewing the Trial Court's exercise of discretion, and these two cases must therefore be read in terms of their particular facts. A glance at the *Owens* and *Irwin* decisions is sufficient to show that, factually, those cases do not remotely resemble ours as regards the decisive substantiality and the just urgency of permitting the defense to go further in attempting to impeach the prosecution witnesses.

We respectfully request this Court to compare for itself the respective factual situations in *Owens* and *Irwin* as contrasted with our case, with a view to determining whether the trial Judge in our case properly exercised his discretion in preventing us from exploring the "collateral" bribery habits of witnesses of the stripe of a Saul Wolf and a Jeremiah Clyne.

If we are correct in our suggestions that the Trial Court's exercise of discretion in this matter presents an at least strongly questionable issue for certiorari consideration, then the error which we urge in this regard would assume

additional seriousness in the light of those larger aspects of the case which we have emphasized in our Reason I, *supra*. That is to say, the important further opportunity which was denied to us—to impeach the accomplice witnesses—could have produced results favorable to petitioner's chances before the Jury in a degree which, while admittedly imponderable, should nevertheless be evaluated in the light of the exceedingly closely reckoned way in which this case was ultimately decided by the Jury, and in the light of our having been deprived also of the "better practice" instruction as to corroboration of accomplice testimony.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted in the interests of the fair administration of Federal Criminal Justice.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioner
William Marks, Jr.

[Appendices Follow]

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 112—September Term, 1966.

(Argued October 18, 1966 Decided November 9, 1966.)

Docket No. 30498

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM MARKS, JR.,

Defendant-Appellant.

Before:

WATERMAN, HAYS and ANDERSON,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* entered upon a jury verdict convicting appellant of violation of 18 U. S. C. §201 by bribing employees of the Internal Revenue Service and of aiding and abetting the employees in violations of 26 U. S. C. §7214 (a)(2).

Affirmed.

OTTO G. OBERMAIER (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Michael W. Mitchell, Assistant United States Attorney, on the brief), *for Appellee.*

MAURICE EDELBAUM, New York, N. Y., *for Appellant.*

PER CURIAM:

Appellant was convicted by jury verdict on two counts of bribing employees of the Internal Revenue Service and on two counts of aiding and abetting these employees in violating 26 U. S. C. §7214(a)(2).

Appellant contends that the federal rule permitting conviction on the uncorroborated testimony of accomplices is not one of invariable application, but that it is the "better practice" to require corroboration and that the circumstances of the present case call for the use of this "better practice." An identical contention was advanced in *United States* v. *Armone,* 363 F. 2d 385, 402 (2d Cir. 1966) and was rejected by this court in an opinion which cited *United States* v. *Kelly,* 349 F. 2d 720 (2d Cir. 1965), cert. denied, 384 U. S. 947 (1966). In the present case the trial judge instructed the jury that the government's witnesses were accomplices and that:

> "You must, therefore, scrutinize their testimony with special care and act upon it with caution."

Appellant also argues that his trial was unfair because the court prevented the defense from cross-examining ac-

complice witnesses as to other occasions on which they had accepted bribes. Defendant was permitted to bring out that the government's witnesses had been convicted for accepting bribes, that they had not yet been sentenced and that they were testifying in the hope of avoiding jail sentences. It was well within the trial judge's discretion to limit further cross-examination of the issue of credibility. *United States* v. *Irwin*, 354 F. 2d 192 (2d Cir. 1965), cert. denied, 383 U. S. 967 (1966).

Affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of November one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM MARKS, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Further Description of the Trial Proofs

(Quoted from Appellant's Brief in the Court Below)

The Government's first witness was HERBERT VANNATTE, an employee of the Manhattan District Office of the Internal Revenue Service, who testified as an expert witness concerning Internal Revenue audit procedures (8a *et seq.*). Mr. Vannatte began by explaining that there are two types of letters from Internal Revenue by which a taxpayer may be requested to supply audit information concerning his tax return, namely, a "call-in letter" and a "correspondence" letter; under the former an office or interview audit is required, and under the latter the taxpayer may if he chooses respond in writing, but he may have an office or interview audit under a "correspondence" letter if he wishes (8a-10a); and if he chooses the latter option the office or interview audit is of the same type as under the call-in letter (10a).*

The next item in Mr. Vannatte's testimony which needs to be noted here was his description of the Internal Revenue office procedures whereby an office audit is assigned to a particular auditor. In essence, Mr. Vannatte's testimony on this topic (on direct examination) was that when the taxpayer or his representative comes into the Inter-

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* Notwithstanding this perfectly clear testimony by its own expert witness that a "correspondence" audit may proceed identically the same as an office audit at the taxpayer's option, later in the trial, in cross examining the defendant himself, the prosecutor tried to make it appear that there was something suspicious about the defendant's having requested office audits under "correspondence" type letters. See our description of the defendant's cross examination *infra*.

nal Revenue Office with the call-in or correspondence letter, the letter is taken by a secretary to a "group supervisor" who will obtain the file on the case and will then and there assign the case to an office auditor, the taxpayer or his representative having no idea beforehand who the assigned auditor will be (10a, 14a). It was not "regular procedure", at the times involved under this indictment, Mr. Vannatte stated, for an accountant to ask an office auditor to assign a particular audit case to himself (14a); or for an office auditor in one "group" to introduce a taxpayer's representative to an office auditor in another group for the purpose of conducting an audit (14a).

Mr. Vannatte also testified about some details of the auditing procedure as such, indicating that as to challenged items the taxpayer or his representative is expected to supply "substantiation", and that it is not "regular procedure" for the auditor to make changes as requested by the taxpayer or his representative without substantiation or "credible oral testimony" (11a-14a).

On cross examination Mr. Vannatte admitted that his testimony on direct examinatiton as to general customs or procedures in the Internal Revenue Service was subject to the qualification that he did not know of his own knowledge that such was at all times carried out, "I would not definitely know in other groups" (17a-18a). Interestingly also, on redirect examinatiton, it was brought out that Mr. Vannatte did not know whether it was possible to tell solely from the Government's pertinent documentary exhibits in this trial whether the particular tax re-

turns were assigned to the auditor by the group supervisor or whether the auditor assigned them to himself (19a). On further cross examination Mr. Vannatte conceded that the Internal Revenue Procedures provided a method of checking, at the conclusion of an audit, such as would disclose to the group supervisor whether in any instance an auditor had obtained assignment of the case other than by the group supervisor himself (19a-21a).

The Government's next witness was SAUL WOLF, a former Internal Revenue auditor who was involved in Counts One, Three, Five and Eight of the within indictment (22a *et seq.*). He testified that he first met the defendant at the Internal Revenue Office at 484 Lexington Avenue, New York City, on October 30, 1962, when the defendant came in for audit of the Armstrong 1961 tax return (23a, 24a). The audit of this particular tax return had been assigned to Wolf prior to that date (23a).* Wolf testified that Marks sat down at his desk, "he had substantiation with him", and as they went over the various items Marks asked "if I could do anything for him, and I said 'Yes'" (24a). Marks asked him to disallow a certain amount, which Wolf did; and Wolf stated that Marks said he would "take care of me and give me $100" (24a). Wolf stated that he falsified his work papers as to the substantiation presented to him by the defendant Marks (24a-25a). The defendant told

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* We note that here, in the very inception of Wolf's testimony in this trial, there is described a drastic procedural departure from the procedures described by the expert witness Mr. Vannatte, i.e., the Armstrong case had been assigned to Wolf before the taxpayer's representative appeared at the office.

Appendix C—Further Description of the Trial Proofs (Quoted from Appellant's Brief in the Court Below)

Wolf that if the latter would stop up at the defendant's office after work that day "he would see me", and later that day, about 5:30 P.M., Wolf went to the defendant's office in the Empire State Building, no one else being present, and the defendant took him into another room and gave him $100 in ten dollar bills, nothing else being said (25a). Wolf said that he would not have made the same allowances on the audit if he had not been promised money (26a).

Wolf also testified concerning the tax return of the taxpayer Caine, involved in Counts Five and Eight, on which the Jury acquitted the defendant (26a *et seq.*). Wolf said that a few days before Marks came in for the purposes of the Caine audit on May 23, 1963, Marks had come in and asked Wolf to have the Caine audit assigned to himself (27a). Then, Wolf said, he called the defendant, told him that he had the case, and for him to come in; the defendant did come in, on May 23, 1963 (27a-28a). The defendant asked Wolf to disallow a certain amount, which Wolf did, and then the defendant told Wolf to come to his office at the end of the day "and he would take care of me" (29a). About 5:30 P.M. on that day, at the defendant's office, the defendant gave Wolf $75 or $100 (29a). Wolf said that he would not have made the same allowances on the Caine return if he had not been promised money by the defendant (30a).

Wolf also testified that after his original meeting with the defendant in October 1962, the defendant asked him about other auditors, in other "groups", who might be "all right", and that Wolf gave him the names of Jeremiah

Appendix C—Further Description of the Trial Proofs (Quoted from Appellant's Brief in the Court Below)

Clyne, Louis Deitsch and Bob McCallion (30a-31a). Also, subsequently Wolf spoke to the latter three auditors (31a).

Wolf also testified that he was removed from his position at Internal Revenue for refusal to answer questions (32a); and that no promises had been made to him for his testimony in this trial (32a).

On cross examination, Wolf testified as follows (33a *et seq.*): In February 1964 he was arrested for bribery (33a-34a). He was taken to the office of Assistant United States Attorney Andrew Maloney, and when Wolf was asked by the cross examiner whether anybody threatened him, he said "Yes" (34a). When asked in what manner Mr. Maloney had threatened him, Wolf said that he was threatened with "as high as fifteen years imprisonment" (34a). Wolf did not have a lawyer with him at that time (34a). Mr. Maloney threatened him with the fifteen years imprisonment if he did not cooperate (34a). Wolf did not answer any questions at that time, and he subsequently retained a lawyer, Jacob P. Lefkowitz, Esq. (34a). The charge of bribery at that time was that Wolf had accepted a bribe from Jeremiah Clyne, also a former employee of Internal Revenue and a witness, in this trial (*infra*) (34a). A moment later in his testimony Wolf said that the charge was that he had given a bribe to Clyne, rather than accepting one from Clyne (35a).

The Court prevented defense counsel from interrogating Wolf as to his having taken bribes from various other accountants, taxpayers, or other taxpayer's representatives (36a). The Court adhered to this ruling after extended legal colloquy (37a-39a).

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Wolf was discharged from his job in March 1964 (39a-40a). In December 1964 he was indicted for conspiracy on multiple substantive counts of giving or accepting bribes (40a). Clyne and Deitsch were among those indicted with him (40a). In March 1965 Wolf was again indicted, on additional charges, Clyne again being a co-defendant (40a). In September 1965 Wolf pleaded guilty to one count of the latter indictment (40a). Sentencing was set for November 9, 1965, but Wolf had not yet been sentenced at the time of this trial (40a). In March 1965 Wolf pleaded guilty to three counts of the earlier of the two above mentioned indictments (41a). At the time of this trial he had not yet been sentenced on the latter plea of guilty (41a). Wolf's attorney had told him that he (the attorney) had spoken to Assistant United States Attorney Mr. Maloney about Wolf's cooperating with the Government (41a-42a). Wolf's attorney told him that if he cooperated in the instant case his cooperation would be called to the attention of the sentencing Judge (42a).

It was brought out on cross examination also that under neither of the indictments to which Wolf pleaded guilty was the present defendant Marks in any way involved (42a).

Wolf admitted that he was testifying in this case because he hoped he would not go to jail, and because he has been told his cooperation would be called to the attention of the sentencing Judge (43a). Wolf has also testified in two other cases, and he was expecting to testify in still another case (43a).

Wolf was also extensively cross examined as to the amount and kind of substantiation which the defendant brought with him during the office audit in October 1962

on the Armstrong case (43 *et seq.*). It developed in this portion of the cross examination that, contrary to Wolf's testimony on direct examination that the allowances which he approved on the Armstrong audit were entirely false or fictitious, there was detailed and significant substantiation indeed which he recalled when confronted therewith, and that there may well have been additional substantiation as to which he could not now recall (43a-52a).

When cross examined about the Caine audit (May 23, 1963)—involved in Counts Five and Eight, on which the Jury acquitted the defendant—Wolf testified, to begin with, that there was evidently nothing improper in his being assigned to that audit, because he was acting supervisor of the group on that day and he therefore had the right to assign any case to himself if he wished to (52a).* However, Wolf also testified that the pertinent Internal Revenue Service record on the Caine audit indicated that the case had been assigned to him by the group supervisor, one A. A. Sullivan (54a).

At 54a-58a the cross examination developed, concerning the Caine audit (as we above saw was true also of the Armstrong audit) that the defendant presented very solid substantiation indeed in support of the allowances which he was requesting. Of special interest in this connection is the fact, testified to by Wolf on cross examination, that

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* The testimony of the expert witness Mr. Vannatte is to this same effect, that an acting supervisor could so assign a case to himself (19a). Wolf also testified on cross examination (Tr. 157-164, not printed) that this self-assignment was on the same day Marks came in and the audit was conducted, thus contradicting his own direct testimony (*supra*). When confronted with this, he said his testimony on cross examination was wrong (Tr. 164).

even though the defendant presented on Caine's behalf a letter from his employer attesting that he was not reimbursed for certain travel and entertainment expenses, Wolf had insisted on a second letter to the same effect from a merely subsidiary company of the employer (57a-58a).*

ROBERT MCCALLION, another former Internal Revenue Service auditor—named in Counts Two and Four of the within indictment—testified for the Government (63a *et seq.*). On December 4, 1962 the defendant Marks came into the Internal Revenue office for an audit of the 1961 tax return of Joe and Ida Barker (63a-64a). This was the first time that McCallion had met Marks, and prior to that day no one had told them that Marks was coming in to see him (64a).** Marks told McCallion his name, stated that Mr. Saul Wolf had sent him, and that Wolf had told him that he could make a deal with McCallion to do a favor for him on the tax return that McCallion was handling (64a-65a). Prior to that time the Barker case had been assigned to McCallion for audit (65a). McCallion described the Barker audit which was done on the day in question, stating that Marks showed him some cancelled checks and other substantiation, but that the audit was nevertheless fictitious (65a-66a).

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* The significance of Wolf's having insisted on this second letter is that it plainly tends to negate the Government's allegations of a phoney audit in the Caine matter.

** This last is interesting in view of Wolf's testimony (*supra*) that he had prearranged for Marks to be in contact with McCallion; see also the defense cross examination of McCallion *infra*, where it appears that McCallion specifically testified that Wolf had not spoken to him about Mr. Marks, and that he (McCallion) had no knowledge whether Marks and Wolf had spoken about him (76a).

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McCallion further testified that on that same day Marks told him he had two more cases in McCallion's group and that he wanted McCallion to see if he could get those cases, which McCallion agreed to do, going to the unassigned file to obtain the cases; he assigned these two other cases to himself; they were the cases of Borkin and Leib (66a-67a). As to both of these cases, McCallion said, Marks did show him some substantiation, but the audits as finally made were fictitious (67a-70a).

Upon the completion of the three audits, McCallion testified, Marks asked him if $200 would be enough, McCallion agreed that it would be, Marks said he would get in touch with him in a week or so to let him know when he could get the money; a week or ten days later Marks telephoned McCallion and asked him to come to his office, which McCallion did, where Marks took him into an inner office and gave him $200; on that same occasion, McCallion said, Marks introduced him to his (Marks') father (70a-71a).

McCallion further testified on direct examination that he resigned from his job in April 1964 because he was under investigation for accepting bribes as an office auditor (71a). He was not arrested in connection with this investigation (71a). He also said that no promises or threats had been made to him to induce him to testify in the instant trial (71a); and when asked what was his understanding as to whether he would be indicted, he said that he understood that he was to expect nothing for cooperating (72a).

On cross examination McCallion admitted that his attorney, Mr. Wachtel, had told him that it would be to his benefit to cooperate with the Government; this was after Mr.

Appendix C—Further Description of the Trial Proofs (Quoted from Appellant's Brief in the Court Below)

Wachtel had conferred with Assistant United States Attorney Maloney (74a); Mr. Maloney himself had apparently also told McCallion that no promise would be made but that his cooperation would be taken into consideration (75a). It was McCallion's hope that by reason of the testimony he was giving in this case, and in another case in which he had previously testified, he would not be indicted or prosecuted (75a).

As indicated in a footnote, *supra,* McCallion also testified on cross examination that Wolf had not previously spoken to him about Marks, and that when Marks told him (McCallion) that Wolf had sent him. McCallion did not know whether this was actually the case (76a).

In the cross examination at 76a-81a, and at 85a, it was developed that McCallion had seen considerable substantiation on the three audits in question, and that he was very uncertain in his recollection as to whether he might have seen additional significant substantiation.

Louis Deitsch, another of the former Internal Revenue Service audit officers—named in Counts Six and Nine on which the Jury acquitted the defendant Marks—testified for the Government (86a *et seq.*). Around September 22 or 23, 1963 Marks came into the Internal Revenue office in connection with an audit of the tax return of a client of his named Cantor (87a-88a). He asked Deitsch whether the latter could get the case assigned to him, and Deitsch said that he would do so (88a). Deitsch then got the Cantor case out of the file the next morning and assigned it to himself (89a). On September 23, 1963 Marks came in again and said to Deitsch that "if we conducted a lenient audit that he would take care of me" (89a). They then con-

ducted an audit which, Deitsch here testified, was fictitious, and for which there was no substantiation (89a-90a). Shortly thereafter Marks telephoned Deitsch saying that he had the signed waiver of the taxpayer and told Deitsch to come down to his office to get the waiver (Tr. 262-263). On September 26, 1963 Deitsch went to the defendant's office in the Empire State Building, at about 5:00 P.M., where the defendant gave Deitsch the signed waiver and $50 (Tr. 263). Deitsch said that he would not have made the audit findings unless he had been promised money (Tr. 265).

Deitsch testified that he had resigned from his job in April 1964, having given as the reason "to seek other employment" (Tr. 265). No promises or threats had been made to him to induce or force him to testify in this trial (Tr. 265-66).

On cross examination Deitsch said that Assistant United States Attorney Maloney told him that if he would cooperate it would be better for him (92a-93a). Deitsch on that occasion—at the time of his apprehension—told Mr. Maloney and two men from the inspection service that he had taken or given other bribes, and he had named names, including the names of accountants and other taxpayers' representatives (93a-94a). He had not at that time mentioned the name of the defendant William Marks (94a). Nor, when he was taken before a Grand Jury later on that day, did he name the defendant Marks, although he named other persons (94a). He further testified that Mr. Maloney, before the Grand Jury appearance, told Deitsch that he was going to be indicted and charged with bribery, that if he were convicted he could get up to fifteen years in prison,

and "that the only possible way that you could save yourself would be to cooperate with the Government" (94a).

Deitsch had pleaded guilty to an indictment charging him with receiving unlawful fees, and on the date of the guilty plea (March 15, 1965) he had been released on his own recognizance with the consent of the United States Attorney; sentence had been set for May 3, 1965, but at the time of this trial he had not yet been sentenced, the sentencing having been adjourned from time to time with consent of the United States Attorney (94a-95a). Deitsch had testified in two, or perhaps three other case, and the Government was expecting him to testify in at least one or perhaps two additional cases (95a). He had later pleaded guilty under another indictment, and had again been released on his own recognizance; nor had he as yet been sentenced on that indictment (95a-96a). He said he was hoping that by reason of his testimony for the Government in this case and other cases he would not be sent to jail (96a).

As regards the assigning of the Cantor case to himself, Deitsch's testimony on cross examination indicated that this could apparently have occurred on a day when he was the acting supervisor and would therefore have the authority to do so (96a-97a).

At 97a-101a Deitsch was cross examined concerning the alleged fictitiousness of the Cantor audit and the alleged total lack of any substantiation; we believe we may say that this cross examination established that the audit had been significantly substantiated by items presented by the defendant to Deitsch.

Jeremiah Clyne, another former Internal Revenue Service office auditor –named in Counts Seven and Ten, as to

which the Jury acquitted the defendant Marks—testified for the Government (106a *et seq.*). Clyne testified first concerning an audit (Babbin) not covered by the indictment and which the Government offered as a prior similar act of the defendant, over defense objections (107a, 110a, 117a). Clyne said that he first met the defendant Marks on January 9, 1964, this being in connection with the Babbin audit (107a). Prior to that Wolf had spoken to Clyne about Marks, and on the date last mentioned Marks appeared at Clyne's desk at the Internal Revenue Service and told him that he (Marks) was the man Wolf had spoken to Clyne about (107a-108a). Clyne further testified that he then secured the Babbin tax return from the unassigned file, and conducted the audit with Marks—the Babbin file not previously having been assigned to Clyne (108a). Marks "asked me if I could prepare a reasonable audit for him", and Clyne said he would; "he told me that when I completed the audit I would get paid" (108a). Clyne said that during the Babbin audit Marks showed him no substantiation at all (109a), and that the audit was "fictitious" (109a).

Clyne further testified that at the conclusion of the Babbin audit Marks asked him if he could audit another case (Doft, the case referred to in Counts Seven and Ten of the indictment) (110a). Clyne got out the Doft tax return (110a). Marks came to Clyne's desk on January 20 for the Doft audit (111a). Clyne testified in considerable detail as to the false devices which he said he used (and himself suggested to Marks) in conducting the allegedly false or fictitious Doft audit (112a-113a), and he said that Marks

at no time during the Doft audit presented him with any substantiation at all (113a-115a).*

Clyne further testified that after completion of the Doft audit Marks invited him to lunch, and to meet him at the Davidson Adelphi Company at Canal Street and Broadway, where Clyne did meet Marks between 1 and 2 o'clock that day, where Marks handed Clyne five twenty-dollar bills (115a-116a).

Clyne resigned from his job in April 1964 "under investigation" (116a).

Clyne's cross examination (127a *et seq.*) brought out the following: When he was first confronted with the investigative charges against him at the Internal Revenue Service on January 29, 1964 and was taken to Assistant United States Attorney Maloney, Clyne at first denied his guilt, but he confessed when confronted with a minifon tape recording which had evidently been taken during a party in a hotel room with friends or colleagues of his from Internal Revenue (127a-131a).

Clyne was thereafter indicted on three separate indictment, under all of which he pleaded guilty, thereupon being released on his own recognizance, and he had not been sen-

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* We respectfully emphasize this very circumstantial and detailed testimony of Clyne because, notwithstanding such, the Jury apparently disbelieved Clyne's testimony in its entirety. On its face, indeed, the Jeremiah Clyne testimony in this trial is by far the "strongest" of that given by any Government witness against the defendant Marks; yet, we again emphasize, the Jury refused to place credence in Clyne. This sector of the case, involving Jeremiah Clyne, reveals in an especially clear way, then, the intense credibility problems which pervaded this entire trial on the side of the prosecution and which seem to us to make so urgent the issues as to corroboration of accomplice testimony (*infra*).

tenced under any of those indictments as of the time of this trial (131a-133a). He had testified in three cases prior to this trial, and was expecting to testify in two more of which he knew (133a).

In several affidavits which he gave to the Government's investigative officers long prior to this trial he had never mentioned the Babbin case in connection with defendant Marks, but only the Doft case, and the cross examination developed that in all likelihood his belated mention of the Babbin case—only about one month before this trial—was an outright fabricational afterthought (133a-136a).

At 137a (still in the cross examination) Clyne, in testifying about his deceptive techniques during the Doft audit, made it quite clear that he was an old hand at deceiving his superiors in the Internal Revenue Service through the use of a private code of various kinds of check marks designed to enable him, if questioned, to cover up his tracks.

At 138a-139a the cross examination of Clye brought out that his allowances in the taxpayer's favor in the Doft audit, which primarily involved charity contributions by a foundation established by the taxpayer on an evidently unexceptionable legal basis, required no sinister explanation.

The defense called as a witness William J. Marks, Sr., the father of the defendant, who testified that he had never met the Government witness McCallion, that McCallion had never come to the office which the senior Mr. Marks and the defendant shared in the Empire State Building and that McCallion had never been introduced to the elder Marks (151a-153a)—McCallion having testified, it will be recalled, that when he allegedly went to the defendant's office in the Empire State Building to be paid $200 he was

introduced to the defendant's father. In the Government's cross examinatiton of Mr. Marks, Sr., it was *apparently* shown that Mr. Marks (senior) mistook Assistant United States Attorney Maloney for Assistant United States Attorney Gaynor in the courtroom (154a-156a)—by which the Government evidently wanted the Jury to conclude that the elder Mr. Marks was deficient in his recollection of names and faces; more specifically, what the Government was trying to establish was that the older Mr. Marks did not remember which one of the Assistants had questioned him before the Grand Jury. The defense then and there called Mr. Gaynor to the stand, whereupon it was established that it was Mr. Gaynor who had questioned the elder Mr. Marks before the Grand Jury, that the elder Mr. Marks had correctly recognized Mr. Gaynor from his physical appearance in the courtroom in this trial as the one who had questioned him, before the Grand Jury, and that the only mix-up had been as to the names of Gaynor and Maloney (156a-157a).

The defendant William Marks, Jr. took the stand in his own defense in this trial (158 *et seq.*). He denied all of the illegalities and improprieties charged by the Government, answering all questions on both direct and cross examination, and going into much detail on every arguably sensitive point in the case. Since we have printed in our Appendix the entirety of his testimony (158a-215a), and since this testimony by the defendant is cardinal for the issues which we are tendering in this appeal, we respectfully assume that the Court will wish to read the defendant's own testimony in its entirety, and we therefore refrain from attempting any summary thereof in this brief.

The defense also introduced character testimony (141a-150a).

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 943

WILLIAM MARKS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A3) is at 368 F. 2d 566.

JURISDICTION

The judgment of the court of appeals (Pet. App. A4–A5) was entered on November 9, 1966. On December 7, 1965, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including January 7, 1967. The petition was filed on January 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conviction may rest upon the uncorroborated testimony of accomplices.

2. Whether the trial court improperly restricted cross-examination of government witnesses.

3. Whether the conviction is subject to reversal for inconsistency in the verdict.

STATEMENT

Petitioner, a certified public accountant and member of the New York bar, was convicted after trial by jury in the United States District Court for the Southern District of New York of two counts charging the bribery of Internal Revenue Service auditors in violation of 18 U.S.C. (1958 ed.) 201 and two counts charging the aiding and abetting of the auditors in receiving unlawful fees in violation of 26 U.S.C. 7214(a)(2). He was acquitted of three counts charging the bribery of Internal Revenue Service auditors in violation of 18 U.S.C. (1964 ed.) 201(b) and three counts charging the giving of money to said auditors because of official acts performed by them in violation of 18 U.S.C. (1964 ed.) 201(f). He was given a one year and one day suspended sentence on each of the four counts upon which he was convicted and placed upon probation for one year, conditioned upon his resignation from the bar and as a certified public accountant and his surrender of his United States Treasury card. The special conditions have been stayed pending appeal (R. 289a).

The government's case consisted of the testimony of four former auditors of the Internal Revenue Service, who testified that petitioner paid them sums ranging from $50 to $200 in return for favorable audits of the tax returns of his clients. It was their testimony that petitioner made the approaches to them, asked

them to assign themselves to his cases, and asked them to suggest other auditors who might also be amenable to similar arrangements. The witnesses admitted that they had either been discharged or had resigned under fire; that (with one exception) they had already pleaded guilty to one or more indictments charging them with receiving bribes or unlawful fees and were awaiting sentence; that they had been and intended to be government witnesses in other bribery cases; and that they hoped by testifying to avoid jail sentences (or, in the case of the unindicted witness, to avoid indictment) (R. 22a–140a *passim*). Petitioner unsuccessfully sought to question two of the witnesses, for impeachment purposes, concerning other bribes which they had accepted for which they had not been indicted (R. 36a–39a, 123a–126a).

Petitioner, testifying in his own defense, denied that he had offered or paid any bribes, contending that he had supported all of his clients' deductions at the audits with proper substantiation (R. 158a–215a *passim*). His father also took the stand to deny having met one of the government witnesses in connection with one of the two transactions upon which the jury convicted (R. 152a–153a), thereby contradicting the witness's testimony on that point (R. 71a).

The trial court instructed the jury that, since the government's witnesses were accomplices, their testimony was to be scrutinized with special care and acted upon with caution, but that nevertheless corroboration was not required (R. 248a). Petitioner noted an exception on this point (R. 263a). The jury, after deliberating for two days and informing the

court three times that it was hopelessly deadlocked (R. 266a, 268a, 279a), convicted on four counts and acquitted on six (R. 283a).[1]

ARGUMENT

1. Ever since *Caminetti* v. *United States,* 242 U.S. 470, 495, it has been accepted in federal practice that accomplice testimony is sufficient, without corroboration, to support a conviction. The most that has ever been required is a cautionary instruction of the type given here by the trial court. See *Williams* v. *United States,* 308 F. 2d 664, 666 (C.A. 9); *Bishop* v. *United States,* 243 F. 2d 32, 33 (C.A. D.C.); *Williamson* v. *United States,* 332 F. 2d 123, 132 (C.A. 5); *United States* v. *Agueci,* 310 F. 2d 817, 833 (C.A. 2), certiorari denied, 372 U.S. 959; *United States* v. *Kelly,* 349 F. 2d 720, 767 (C.A. 2), certiorari denied, 384 U.S. 947. It is particularly appropriate not to require corroboration in a bribery case such as this one, where physical evidence is unlikely and only the two parties to the transaction are likely to have any direct knowledge concerning it. Compare *United States* v. *Agueci, supra,* 310 F. 2d at 833.

2. It is familiar law that a witness may be impeached by proof of prior convictions but not by proof of criminal conduct which did not result in a conviction (*Michelson* v. *United States,* 335 U.S. 469, 482), and that the permissible limits of cross-examination are committed to the discretion of the trial court (*Glasser* v. *United*

[1] Deliberations were continued, after the last two occasions upon which the jury announced itself deadlocked, at the request of petitioner (R. 268a–270a, 279a–280a).

States, 315 U.S. 60, 83). Here the motivation of each accomplice witness to testify in the hope of avoiding either a jail sentence or an indictment was amply demonstrated to the jury. The further questions concerning the receipt of other bribes which petitioner sought to ask of two of the witnesses were therefore cumulative, and the trial court was well within its discretion in refusing to permit them.

3. Petitioner was charged with five separate instances of bribery, involving four different Revenue Service auditors. Hence, as a matter of law, there was no inconsistency in the jury's finding him guilty in respect to two of the instances and acquitting him in respect to the other three. *Dunn* v. *United States,* 284 U.S. 390, 393. In any event, juries are not required to be consistent in their verdicts. *Dunn* v. *United States, supra; United States* v. *Dotterweich,* 320 U.S. 277, 279.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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